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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Implementation of Section 11)
of the Cable Television Consumer Protection)
and Competition Act of 1992) MM Docket No. 92-264
Horizontal Ownership Limits)

**COMMENTS OF CONSUMERS UNION,
CONSUMERS FEDERATION OF AMERICA,
CENTER FOR MEDIA EDUCATION,
ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS,
OFFICE OF COMMUNICATION, INC. UNITED CHURCH OF CHRIST.**

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SUMMARY

There is an elephant in the FCC's regulatory parlor. It is impossible to discuss how best to implement the Congressional mandate that the FCC establish limits on the reach of the nation's largest cable television system operators without first recognizing that seven years after Congress overrode a Presidential veto to enact the 1992 Cable Act, the FCC has yet to begin enforcement of any such rules. It is far more important to put the Commission's ownership rules into effect than to quibble over how they may be improved. Putting aside the overriding question of why there are no operative rules to amend, the Commission's questions are otherwise important, and CU, *et al.* welcome the opportunity to address them.

Although the Commission has already denied, in this docket, the request of two of the commenters here that it lower the horizontal ownership limit, the case for lower limits is stronger than ever. In no event should the Commission raise the current cap, directly or indirectly. Even without the critical data those provisions would have generated during the last five years, it is clear that horizontal concentration is increasing, and reaching a critical point. During the five year period that the Commission has left its horizontal rules unenforced, the number of cable multiple systems operators have expanded their coverage so that they are approaching the current limit. While increased consolidation has undoubtedly allowed the cable industry to benefit from economies of scale, these benefits have not reached the public. As consolidation increases, the possibility of coordinated monopolistic behavior increases.

The Commission should not include non-cable multi-channel video program distributors (MVPDs) in its national ownership limit. Because new MVPD technologies are not yet fully competitive with cable as a source of programming for consumers, their development does not yet

justify the modification of the cable horizontal ownership rules. Non-cable MVPDs have not, and may never, become significant competitors with cable television as a purchaser of independent programming. If the Commission were to incorporate non-cable MVPDs into its national cable ownership limits at this time, those limits would inaccurately reflect competition that does not yet exist. If, in the future, non-cable MVPDs become a direct competitor to cable, amendment of the Commission's rules as proposed will be fully appropriate. If the Commission chooses to add non-cable MVPDs to the national ownership limit, it must not be used as a back door device to increase the permissible level of horizontal concentration. If the Commission takes such action, it must recalibrate the ownership formula to retain the limit at its current level.

CU, *et al.* believes the Commission should retain the homes passed standard in calculating the horizontal ownership limits. Given the frequent changes in cable subscribership, the homes passed system is more stable than a subscriber based system. In addition, the subscriber based standard may have the effect of discouraging subscriber growth.

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COMMENTS OF CONSUMERS UNION, *et al.*

Consumers Union, Consumers Federation of America, Center for Media Education, Association of Independent Video and Filmmakers, and Office of Communication, Inc., United Church of Christ ("CU, *et. al.*") respectfully submit these comments in response to the Commission's June 26, 1998 *Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking* ("MO&O/ FNPRM") in this docket.

INTRODUCTION AND REALITY CHECK - AMEND WHAT?

There is an elephant in the FCC's regulatory parlor. It is impossible to discuss how best to implement the Congressional mandate that the FCC establish limits on the reach of the nation's largest cable television system operators without first recognizing that seven years after Congress overrode a Presidential veto to enact the 1992 Cable Act, the FCC has yet to begin enforcement of any such rules. It is far more important to put the Commission's ownership rules into effect than to quibble over how they may be improved.

In 1992, Congress told the FCC to impose stringent pricing, ownership and behavioral limitations on a cable industry that had reinforced its market dominance since being substantially deregulated in 1984. After six years of relaxed regulation, Congress found that "[t]he cable industry

has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers. . . ." 1992 Cable Act, Section 2(a)(4).

The Commission and most of the individual Commissioners have expressed concern that the common promise of the 1984 Cable Act, the 1992 Cable Act and the 1996 Telecommunications Act--that competition will emerge and obviate the need for other forms of regulation--as yet remains unfulfilled. The Commission's own analysis indicates that the cable industry's exercise of monopoly power is the rule, not the exception. *Fourth Annual Report, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034 (1998) ("1997 Competition Report").

Even as the Commission has asked for comment on how to amend rules it has never put into effect, it has declined to lift its stay on enforcement of them. *MO&O/FNPRM*, ¶¶ 72-77. Whatever misplaced doubt the Commission may have had when it adopted its horizontal limits, solid new Supreme Court authority supports them, *Turner Broadcasting System v. FCC*, 117 S.Ct. 1174 (1997); *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445 (1994), and the public still has ample need for them. This docket should not be an excuse to delay making the existing rules immediately effective.

Putting aside the overriding question of why there are no operative rules to amend, the Commission's questions are otherwise important, and CU, *et al.* welcome the opportunity to address them. The Commission asks for comment on several issues concerning the cable horizontal ownership limits, including (1) whether 30% remains the appropriate horizontal ownership limit in light of evolving market conditions; (2) whether the rules should consider the presence in the market of all multichannel video programming distributors ("MVPDs") rather than cable operators alone; and (3)

whether the rules should be based on actual subscriber numbers rather than on homes passed.

I. THE COMMISSION SHOULD STRENGTHEN EXISTING HORIZONTAL OWNERSHIP LIMITS

In the *MO&O/FNPRM*, the Commission proposes to review the horizontal ownership rules in light of changes in the marketplace since the rules were adopted in 1993. *MO&O/FNPRM*, ¶ 78. Specifically, the Commission seeks comment on whether 30% remains the appropriate horizontal ownership limit in light of evolving market conditions. *Id.* Although the Commission has already denied the request in this docket of two of the parties commenting here, Center for Media Education and Consumer Federation of America, that it lower the horizontal ownership limit, the case for lower limits is stronger than ever. In no event should the Commission raise the current cap, directly or indirectly.

As the Commission notes, “[a]s of June 1997, there were more than 64 million cable subscribers representing more than 66% of all television households in the United States. As such, cable television remains a primary source of information and programming for many households in the United States.” *Id.* at ¶ 38. Because cable television is such an important medium of communication, Congress passed the 1992 Cable Act to “promote the availability to the public of a diversity of views and information,” and to “ensure that cable operators do not have undue market power vis-a-vis video programmers and consumers.” 1992 Cable Act, §2(b). Congress found that the effects of having a highly concentrated cable industry “are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.” *Id.*, §2(a)(4).

Although the Commission’s ownership reporting requirements are not as important as the ownership rules themselves, the Commission’s refusal to enforce its data collection rules for the last

five years is even less defensible than the refusal to enforce the underlying ownership limits. *See MO&O/FNPRM* at ¶ 76 (lifting stay with respect to the reporting requirements). Even without the critical data those provisions would have generated during the last five years, it is clear that horizontal concentration is increasing, and reaching a critical point. During the five year period that the Commission has left its horizontal rules unenforced, a number of cable multiple systems operators (“MSOs”) have expanded their coverage so that they are approaching the current limit. For example, TCI reached 27% of homes passed by cable in 1993 and 29.32% by the time of the 1997. *See MO&O/FNPRM*, ¶ 43; *1997 Competition Report*, Appendix E, Table E-3. Even without the necessary strengthening and clarification of the attribution rules under consideration in CS Docket 98-82, recently completed transactions may have brought TCI over the 30% limit.¹ In 1993, when the horizontal ownership limits were issued, the top two cable MSO’s provided service for 36.9% of cable subscribers. *Id.* at Appendix E, Table E-4. By the time of the *1997 Competition Report*, the top two MSOs provided cable service for nearly half of all cable subscribers nationwide. *Id.* Extending the horizontal ownership limit will likely produce another rush to whatever new ownership limit the Commission may establish, thereby further diminishing competition.

While increased consolidation has undoubtedly allowed the cable industry to benefit from economies of scale, these benefits have not reached the public. Cable operators on average have increased their rates 8.5% over the twelve month period from July 1996 to July 1997. *1997 Competition Report*, ¶ 7. Moreover, limiting horizontal concentration need not impede the

¹ Because the Commission’s reporting requirements have been stayed, it is impossible to determine whether recently announced joint ventures and other transactions involving TCI and other large cable MSOs such as Cablevision, Time-Warner, may have placed these MSOs above the 30% threshold. *See MO&O/FNPRM*, n. 104.

development of the industry and the availability of technology to the detriment of the public. Greater concentration is not a prerequisite for cable operator investment in new programming services or deployment of advanced cable technologies.

As consolidation increases, the possibility of coordinated monopolistic behavior increases. Higher concentration may give MSOs the market power to extract unreasonable concessions from program suppliers and to unfairly restrain competition from alternative distribution sources. If horizontal ownership increases, a small number of MSOs will control systems in most of the largest markets in the country. This means that non-vertically integrated programming services will have incentives to maintain exclusive distribution arrangements with the large MSOs. *Id.* at ¶ 233. As the Commission has stated, “entry by new MVPDs is neither cheap nor easy and cable system operators remain the dominant distributors of video programming. As a result, decreases in diversity of information sources or viewpoints that accompany increased concentration among purchasers of programming cannot be easily remedied.” *MO&O/FNPRM*, ¶ 12. Horizontal ownership limits are needed to preserve the public’s access to diverse sources of information.

Stronger horizontal ownership rules will serve to facilitate the development of competition in those markets already dominated by cable MSOs. The rules will limit the ability of large MSOs to merge to form one or two entities which would control local cable markets nationwide. Stringent horizontal ownership limits are also needed to reduce the extent to which large MSOs can coordinate their behavior and forbear from overbuilding each other’s markets. As the Commission notes, “[c]oordinated activity between cable MSOs, whether tacit or overt, is more likely with few firms than many.” *MO&O/FNPRM*, ¶ 40. To address this anti-competitive threat, the Commission should retain, if not lower, the current cable horizontal ownership limits.

Consumers will benefit from increased competition brought about by strong horizontal ownership rules. The Commission has found that when cable operators face effective local competition, the majority of incumbent cable operators responded by offering subscribers: “(1) improved programming; (2) additional channels at the same monthly rate; (3) reduced rates for basic tier service; and (4) new services such as upgraded converter boxes with interactive programming guides.” *1997 Competition Report*, ¶ 178. Overall, noncompetitive cable operators charge higher average monthly rates than competitive operators in each of the time periods studied by the Commission. *Id.*, ¶ 38. By reducing the cable horizontal ownership limits, the Commission will serve the public interest by promoting a competitive cable market.

II. THE COMMISSION SHOULD NOT REVISE THE RULES TO INCLUDE ALTERNATIVE MVPDs IN THE MEASURE OF HORIZONTAL CONCENTRATION.

The Commission seeks comment on its proposal to revise its rules to consider the presence in the market of all MVPDs, not just cable operators. *MO&O/FNPRM*, ¶ 79. The Commission states that the revision may be needed to “reflect the emergence of competitors to cable in the video marketplace, as well as potential MSO increases in market power through acquisition of interests in other MVPDs.” *Id.* at ¶ 81. The Commission claims that this revision would provide a more accurate measure of MSOs’ market power by recognizing the impact of all purchasers of video programming, not just cable operators. *Id.* The proposal would result in an adjustable horizontal ownership limit, wherein the number of cable subscribers a cable operator would be allowed to reach would decrease in proportion with any increase in the number of subscribers the entity reaches through other MVPDs.

Although new MVPD technologies are an important potential source of competition with

cable television, they are not yet fully competitive with cable as a source of programming for viewers. Therefore, their development does not yet justify the modification of the cable horizontal ownership rules.² Some MVPD technologies have yet to establish their commercial viability. The only service that has even begun to fulfill its promise, direct broadcast satellite ("DBS") service, has not penetrated U.S. households to any degree comparable to the penetration of cable. *1997 Competition Report*, ¶¶ 11, 15-16 (1998). Although DBS is cable's major competitor, it currently has only 5.1 million subscribers, and faces physical limitations which leave many households permanently beyond its reach. *Id.*, ¶ 55.

Several factors place alternative MVPDs at a disadvantage. For example, the capacity of wireless cable operators is limited to a total of 33 channels. In comparison, almost 60% of cable subscribers receive at least 54 channels, and major upgrades are underway in many communities. *Id.*, ¶ 8. In addition, DBS service providers are currently prohibited from offering local television signals, which are the mainstay of cable operators' programming fare. *See* Satellite Home Viewer Act of 1988, 17 U.S.C. § 119. The Commission itself maintains that DBS "is not, *by itself*, a direct substitute for cable service given the continued popularity of broadcast television programming and the absence of local broadcast signals from satellite distribution." *1997 Competition Report*, ¶ 11 (emphasis added). This is demonstrated by recent data showing that, although new technologies have increased their customer base, little if any of non-cable MVPD expansion has come at the expense of the cable industry. As testimony submitted to the Commission last fall explains, in the three years from 1994 to 1996, when non-cable MVPDs added approximately 9.5 million subscribers, cable's

²In addressing the merits of whether non-cable MVPDs should be included in the national ownership calculation, CU, *et al.* express no opinion as to whether such action is statutorily permissible.

subscriber growth has been steady and its capture rate was been higher than during the previous three years.³ Statement of Dr. Mark N. Cooper at 12, *Petition to Update Cable Television Regulations and Freeze Existing Television Rates* (filed in MM Docket Nos. 92-264, 92-265, 92-266 on Sept. 22, 1997). Thus, at this time, it is likely that satellite service is a different commodity from cable service, competing for a different market, or at best a small niche market that it shares with cable. *Id.* Indeed, DBS subscribers may continue to subscribe to cable service to fill in the gaps in programming provided by DBS. Because alternative MVPDs have not developed into full-fledged competitors to cable services, they should not be included in the calculation of the cable horizontal ownership limits.

Non-cable MVPDs have not, and may never, become significant competitors with cable television as a purchaser of independent programming. The testimony of Matthew Oristano, Chairman of People's Choice TV and the Wireless Cable Association's Government Relations Committee, before the Commission's *en banc* hearing on competition in the multichannel video industry is also illustrative of this problem. *Competition in the Multichannel Video Industry En Banc Hearing*, Transcript at 56-57 (Dec. 18, 1997). Mr. Oristano described his attempts to acquire programming from Viacom, which was, at the start of the negotiations, vertically integrated and thus subject to the Commission's program access rules. *Id.* The contract negotiations were complete, but for the signing of the contract, when TCI purchased Viacom's cable systems, thus removing Viacom from the reach of the program access rules. At that point, Viacom refused to sell its programming to the People's Choice wireless cable systems, but was willing to sell its programming to People's SMATV systems. As Mr. Oristano noted, wireless cable is a significant cable competitor, but SMATV is not. *Id.*

³The "capture rate" is calculated by adding the number of homes not subscribing in the previous year to the number of new homes formed.

This example graphically illustrates the inability of non-cable MVPDs to compete with cable as program purchasers. Viacom, an independent program distributor that should have no incentive to withhold programming from any MVPD, decided to follow a policy of *reducing* the number of viewers able to watch its programs. Viacom's behavior is explicable only as the result of explicit or implicit threats from TCI that it would not distribute Viacom's programming if Viacom were to sell programming to TCI's competitor, People's Choice. TCI has a monopsony over program purchasing and can force programmers, through implied threats or non-written agreements, to withhold programs from cable competitors. In addition, TCI can use its monopsony power not only to force Viacom to refuse to sell programming to TCI's competitors, but also to force Viacom to forgo any price premium that it would otherwise be able to charge TCI for giving TCI exclusive access to Viacom's programming. *See also* Statement of Dr. Mark N. Cooper at 13-14 (describing the monopsony power of cable in the program purchase market).

Viacom itself has seen fit to file two antitrust law suits complaining of anticompetitive activity by cable system operators and by competing program distributors. Specifically, Viacom alleged that TCI used its monopsony power over the program purchase market to extract unfair and anti-competitive terms and conditions from cable television programmers. *Viacom Int'l v. TCI*, Docket No. 93 Civ. 6658 (S.D.N.Y. 1993). This case was ultimately settled when Viacom sold its cable systems to TCI, thus resulting in greater power for TCI. In another case, Viacom alleged that certain cable operators refused to carry its Showtime network because parties who had an interest in HBO also had an interest in those cable operators and sought to exclude Showtime because it is HBO's competitor. *Viacom Int'l v. Time, Inc.*, Docket No. 89 Civ. 3139 (S.D.N.Y. 1989). Viacom received \$335 million to settle this case. *See* Robichaux, "Viacom to Report Quarterly Rebound on Cable,"

Wall St. Journal (Oct. 22, 1992). The practices at issue in these cases are made possible because cable does not face any competition from other program purchasers in the program distribution market.

CU, *et al.* have often encouraged the Department of Justice and the Commission to be cognizant of the *potential* competition that DBS and other non-cable MVPDs might provide to cable service for the purpose of pure antitrust analysis. The distinction between excluding non-cable MVPDs for the purpose of the Commission's national ownership rules and including them for the purpose of antitrust analysis is the difference between *potential* competition and *actual* competition. Non-cable MVPDs are not yet effective competitors with cable. The Commission and other federal agencies must take action to preserve the independence and competitiveness of DBS and other non-cable MVPDs because they cannot allow cable television providers to prevent a competitor from emerging. The Commission's national ownership rules serve a different purpose. These rules prevent over-concentration in the cable industry, which now is essentially a monopoly. If the Commission were to incorporate non-cable MVPDs into its national cable ownership limits at this time, those limits would inaccurately reflect competition that does not yet exist. If, in the future, non-cable MVPDs become a direct competitor to cable, amendment of the Commission's rules as proposed will be fully appropriate.

III. IF THE COMMISSION DETERMINES TO INCLUDE ALL MVPDs IN ITS CALCULATION OF CABLE NATIONAL OWNERSHIP LIMITS, IT MUST, AT A MINIMUM, ADJUST THE FORMULA SO THAT NO INCREASE IN CABLE OWNERSHIP IS ALLOWED.

The Commission's proposal is ambiguous as to a point that must be very clearly stated: changing the method of calculation must not be used as a back door device to increase the permissible

level of horizontal concentration. The current national ownership limit is 30% of all cable subscribers. If the Commission were to incorporate non-MVPD subscribers into the national ownership calculation, the Commission must recalibrate the ownership formula to retain the limit at its current level. To illustrate, 30% of all cable and non-cable MVPD subscribers constitutes a greater number of subscribers than 30% of all cable subscribers alone. Adopting a change in the formula indiscriminately would allow cable operators to serve more subscribers under the new rule than they are allowed to serve under the present rule. The Commission must, therefore, adjust any new rule it adopts to retain the current limit.

IV. THE COMMISSION SHOULD CONTINUE TO BASE THE HORIZONTAL OWNERSHIP RULES ON HOMES PASSED RATHER THAN ON ACTUAL SUBSCRIBER NUMBERS.

In conjunction with including MVPDs in the calculation of the horizontal ownership limits, the Commission asks whether it should base its rules on actual subscriber numbers rather than on homes passed. *MO&O/FNPRM*, ¶ 79. The Commission notes that the homes passed standard may be difficult to apply if they revise the horizontal ownership rules to consider all MVPDs. *Id.*, ¶ 85. Not only may several different MVPDs pass the same homes, but the homes passed standard does not accurately measure the market power of a new MVPD whose actual subscribership is only a small fraction its potential reach. *Id.* The Commission also claims that as alternative MVPDs continue to grow, “the number of homes passed by a cable operators may become an increasingly inaccurate measure of its actual subscribership and thus of its actual market power.” *Id.*

Consistent with its recommendation to exclude non-cable MVPDs from the national ownership rule, CU, *et al.* believes the Commission should retain the homes passed standard in calculating the horizontal ownership limits. Given the frequent changes in cable subscribership, the

homes passed system is more stable than a subscriber based system. In addition, the subscriber based standard may have the effect of discouraging subscriber growth. As an MSO gets closer to the horizontal ownership limit, it may cease taking on new subscribers. Because few cable operators face effective competition within their franchise areas, consumers may not be able to acquire cable programming from an alternate source. *See 1997 Competition Report*, ¶ 178. The slight gains that may be made in accuracy are not worth the prospect of shutting consumers out of cable service. Moreover, because so many cable operators are the only source of cable programming within their franchise area, the homes passed standard, even though it measures potential, rather than actual subscribers, remains an accurate measure of market power.

CONCLUSION

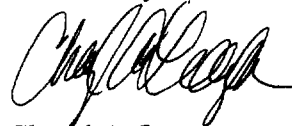
The time is long past for enforcement of what is a clear, and clearly needed, Congressional mandate. The Commission is correct to be concerned that such regulations as it adopts be appropriate

and effective. But its current regulatory posture -- no regulation -- is neither appropriate nor effective.

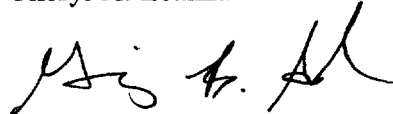
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